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RAVINDRAN RAMASAMY v. PP

FEDERAL COURT, PUTRAJAYA
ABDULL HAMID EMBONG FCJ
SURIYADI HALIM OMAR FCJ
ZAINUN ALI FCJ
B JEFFREY TAN FCJ
AZAHAR MOHAMED FCJ
[CRIMINAL APPEAL NO: 05-58-2013]
22 SEPTEMBER 2014

C ***CRIMINAL PROCEDURE:*** *Charge – Duplicity of – Charge read that offence committed under s. 3A Firearms (Increased Penalties) Act 1971 – Whether particulars of offence pointed to both offences under ss. 3 and 3A – Whether ran foul of s. 163 Criminal Procedure Code – Whether accused an accomplice or principal offender – Whether accused could be separately charged and tried under ss. 3 and*
D *3A – Whether proper to state s. 34 Penal Code in charge – Whether there was error or omission to state ingredients of offence – Whether accused misled – Whether there was a failure of justice – Whether defect in charge could be cured – Criminal Procedure Code, ss. 156 & 422 – Whether conviction a nullity*

CRIMINAL PROCEDURE: *Charge – Defective charge – Charge read that offence*
E *committed under s. 3A Firearms (Increased Penalties) Act 1971 – Duplicity of charge – Whether particulars of offence pointed to both offences under ss. 3 and 3A – Whether ran foul of s. 163 Criminal Procedure Code – Whether there was error or omission to state ingredients of offence – Whether accused misled – Whether there was a failure of justice – Whether defect in charge could be cured – Criminal*
F *Procedure Code, ss. 156 & 422 – Whether conviction a nullity*

The appellant was tried and convicted by the High Court for an offence under s. 3A of the Firearms (Increased Penalties) Act 1971 ('FIPA'). The appellant was alleged to have robbed a jewellery shop. In brief, the charge read that during the course of the commission of the offence, the appellant and another
G person ('Jayakumar') who is now deceased, discharged a firearm with intent to cause death or hurt and with the knowledge that his accomplice had the firearm in his custody or control. It also stated that the appellant had committed an offence under s. 3A of the FIPA and was punishable under the same section read together with s. 34 of the Penal Code. The Court of Appeal
H dismissed the appellant's appeal against his conviction and sentence, thus an appeal was filed to this court. The issues that arose for consideration were (i) whether the charge was bad for duplicity; and (ii) whether the defective charge could be cured *vide* s. 422 of the Criminal Procedure Code ('CPC'). By citing s. 156 of the CPC, the prosecution, however, submitted that the
I appellant was not misled since he was able to put up his defence.

Held (allowing appeal; setting aside conviction and sentence)
Per Jeffrey Tan FCJ delivering the judgment of the court:

(1) The charge against the appellant was for an offence under s. 3A of the FIPA. Pursuant to that section, the appellant was an accomplice and it should follow that the particulars of the offence would agree with the alleged fact that the appellant was an accomplice. However, that was not how the charge was framed. The charge alleged that the appellant and Jayakumar discharged a firearm which was at odds with a charge under s. 3A. At the same time, the charge also alleged that the appellant was aware that Jayakumar had in his custody or control a firearm. This was consistent with a charge under s. 3A. Since the particulars of the alleged offence straddled both ss. 3 and 3A, it would not seem that the instant charge could have given fair notice to the appellant of the section of the law against which the alleged offence was said to have been committed. Further, under the FIPA, an offender could not be both principal offender and an accomplice at the same time. Therefore, even if separate charges were preferred, the appellant could not be charged and tried under ss. 3 and 3A. (paras 13 & 23)

(2) As the particulars of the charge also pointed to s. 3 of the FIPA being offended, it must be seriously doubted that the mere mention of s. 3A would have conveyed to the appellant that there was no other section of law against which the alleged offence was said to have been committed. Further, the essential ingredient of an offence under s. 3A is the presence of the accomplice at the scene of the commission or attempted commission or abetment of the scheduled offence. The presence of the appellant, however, was not stated in the charge, which should not be so if the section of law against which the alleged offence was said to have been committed was under s. 3A. On the contrary, the fact that the appellant was at the scene need not be stated if the section of law against which the alleged offence was said to have been committed was under s. 3. (paras 13 & 14)

(3) Section 34 of the Penal Code was not an ingredient of the alleged offence. However, with the induction of s. 34, the instant charge gave notice to the appellant that the case against him was that the criminal act done by him and Jayakumar was as if it was done by him alone. In effect, the notice to the appellant was that the discharge of the firearm was as if it were discharged by him. The charge also alleged that the appellant was aware that Jayakumar had a firearm in his custody or control. As such, the charge described two offences or parts of two offences, *ie*, one under s. 3 and the other under s. 3A, which ran foul of s. 163 of the CPC and was therefore bad for duplicity. (para 15)

(4) Pursuant to s. 156 of the CPC, no error in stating the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars shall be regarded, at any stage of the case, as material unless the accused was in fact misled by that error or omission. In view of s. 422, for an error or omission to be material, it is not enough that the accused had been misled. There must also be a failure of justice. The "error" alluded to in s. 156 of the CPC is the error in stating the offence or the particulars required to be stated in the charge and not the error in stating the ingredient of an offence. The distinction of whether an error in stating the particulars or an error in stating the ingredients must be drawn for the purposes of s. 156 and/or s. 422 of the CPC. (paras 27 & 28)

(5) Section 156 and/or s. 422 of the CPC would not save a defective charge where the accused was misled and a failure of justice has occasioned. On the facts, the appellant would have been misled and that a failure of justice would have been occasioned was most apparent. The omission in not stating the presence of the appellant at the scene would have misled him to believe that the case to answer was not for an offence under s. 3A. Rather, the omission, coupled with the error in stating that the appellant and Jayakumar discharged a firearm, could even have convinced the appellant that the case to answer was indeed for an offence under s. 3 FIPA. The charge for an offence under s. 3 read with s. 34 and/or s. 3A read with s. 34 is unknown in law. The conviction was thus a nullity and there was a total failure in the administration of justice. (para 37)

Bahasa Malaysia *Translation Of Headnotes*

Perayu telah dibicarakan dan disabitkan oleh Mahkamah Tinggi bagi kesalahan di bawah s. 3A Akta Senjata (Penalti Lebih Berat) 1971 ('FIPA'). Perayu dituduh melakukan rompakan di sebuah kedai emas. Secara ringkas, pertuduhan menyatakan bahawa semasa melakukan kesalahan itu, perayu dan seorang lagi ('Jayakumar'), yang telah meninggal dunia, telah melepaskan tembakan dengan niat untuk menyebabkan kematian atau kecederaan dengan pengetahuan bahawa rakan sejenayahnya mempunyai senjata api dalam kawalan atau jagaannya. Juga dinyatakan bahawa perayu telah melakukan satu kesalahan di bawah s. 3A FIPA dan boleh dihukum di bawah seksyen yang sama dibaca bersama s. 34 Kanun Keseksaan. Mahkamah Rayuan telah menolak rayuan perayu terhadap sabitan dan hukuman, oleh itu satu rayuan telah difailkan di mahkamah ini. Isu-isu yang dibangkitkan untuk pertimbangan adalah (i) sama ada pertuduhan tidak sah disebabkan penduaan; dan (ii) sama ada pertuduhan yang cacat itu boleh diperbetulkan melalui s. 422 Kanun Tatacara Jenayah ('KTJ'). Merujuk kepada s. 156 KTJ, pihak pendakwaan, walau bagaimanapun, menghujahkan bahawa perayu tidak terkeliru kerana dia dapat mengemukakan pembelaannya.

Diputuskan (membenarkan rayuan; mengenepikan sabitan dan hukuman) Oleh Jeffrey Tan HMP menyampaikan penghakiman mahkamah:

(1) Pertuduhan terhadap perayu adalah untuk satu kesalahan di bawah s. 3A FIPA. Berikutan seksyen tersebut, perayu merupakan rakan sejenayah dan butir-butir kesalahan menunjukkan bahawa perayu merupakan rakan sejenayah. Walau bagaimanapun, pertuduhan tidak dirangka sebegitu. Pertuduhan bahawa perayu dan Jayakumar telah melepaskan tembakan adalah bercanggah dengan pertuduhan di bawah s. 3A. Pada masa yang sama, pertuduhan juga menyatakan bahawa perayu mempunyai pengetahuan bahawa Jayakumar mempunyai senjata api dalam kawalan atau jagaannya. Ini adalah konsisten dengan pertuduhan di bawah s. 3A. Memandangkan butir-butir kesalahan yang dipertuduhkan merentangi kedua-dua ss. 3 dan 3A, ia tidak menunjukkan bahawa pertuduhan di sini telah memberi notis yang adil kepada perayu berkenaan seksyen undang-undang bagi kesalahan yang dituduh telah dilakukan. Tambahan lagi, di bawah FIPA, seseorang pesalah tidak boleh menjadi pesalah prinsipal dan juga rakan sejenayah pada masa yang sama. Oleh itu, walaupun pertuduhan berasingan dikenakan, perayu tidak boleh dituduh dan dibicarakan di bawah ss. 3 dan 3A.

(2) Memandangkan butiran pertuduhan menjurus kepada pelanggaran s. 3 FIPA, adalah amat diragui bahawa penyataan mengenai s. 3A semata-mata akan menyampaikan kepada perayu bahawa tidak terdapat seksyen undang-undang lain bagi kesalahan yang dituduh dilakukan. Tambahan lagi, ingredien penting bagi kesalahan di bawah s. 3A adalah kehadiran rakan sejenayah di tempat kesalahan itu dilakukan atau cuba dilakukan atau bersubahat melakukan kesalahan tersebut. Kehadiran perayu, walau bagaimanapun, tidak dinyatakan dalam pertuduhan, yang sepatutnya tidak betul jika seksyen undang-undang di mana kesalahan dikatakan telah dilakukan adalah di bawah s. 3A. Sebaliknya, fakta bahawa perayu berada di tempat kejadian tidak perlu dinyatakan jika seksyen undang-undang di mana kesalahan dikatakan telah dilakukan adalah di bawah s. 3.

(3) Seksyen 34 Kanun Keseksaan bukanlah ingredien bagi kesalahan yang dituduh. Walau bagaimanapun, dengan adanya s. 34, pertuduhan di sini telah memberi notis kepada perayu bahawa kes terhadapnya di mana kelakuan jenayah yang dibuat oleh perayu dan Jayakumar adalah seumpama ianya dilakukan oleh perayu seorang. Sebagai kesannya, notis kepada perayu adalah bahawa senjata api telah dilepaskan olehnya. Pertuduhan juga menyatakan bahawa perayu berpengetahuan bahawa Jayakumar mempunyai senjata api dalam kawalan dan jagaannya. Oleh itu, pertuduhan telah memberi gambaran untuk dua kesalahan atau dua

bahagian kesalahan, iaitu, satu di bawah s. 3 dan lagi satu di bawah s. 3A, yang telah melanggar s. 163 KTJ dan oleh itu, tidak sah disebabkan penduaan.

(4) Berdasarkan s. 156 KTJ, tiada kesilapan dalam menyatakan kesalahan atau butir-butir yang dikehendaki dinyatakan dalam pertuduhan, dan tiada peninggalan dalam menyatakan kesalahan atau butir-butir itu, boleh diambilkira, pada mana-mana peringkat kes, sebagai material melainkan jika tertuduh sebenarnya telah tersalah arah oleh sebab kesilapan atau peninggalan tersebut. Dari sudut s. 422, bagi suatu kesilapan atau peninggalan menjadi material, adalah tidak mencukupi untuk tertuduh tersalah arah. Perlu ada ketidakadilan. "Kesilapan" yang dinyatakan dalam s. 156 KTJ adalah kesilapan dalam menyatakan kesalahan atau butir-butir yang perlu dinyatakan dalam pertuduhan dan bukan kesilapan dalam menyatakan ingredien kesalahan. Perbandingan sama ada kesilapan menyatakan butir-butir atau kesilapan menyatakan ingredien-ingredien mesti dibuat bagi kehendak s. 156 dan/atau s. 422 KTJ.

(5) Seksyen 156 dan/atau s. 422 KTJ tidak boleh menyelamatkan pertuduhan yang cacat di mana tertuduh terkeliru dan satu ketidakadilan telah berlaku. Berdasarkan fakta, adalah jelas bahawa kemungkinan perayu telah terkeliru dan suatu ketidakadilan boleh berlaku. Peninggalan dalam tidak menyatakan kehadiran perayu di tempat kejadian telah membuatkan perayu terkeliru bahawa kes untuk dijawab bukanlah untuk suatu kesalahan di bawah s. 3A. Sebaliknya, peninggalan tersebut bersama-sama dengan kesilapan menyatakan bahawa perayu dan Jayakumar telah melepaskan tembakan, mungkin boleh meyakinkan perayu bahawa kes untuk dijawab adalah bagi suatu kesalahan di bawah s. 3 FIPA. Pertuduhan bagi kesalahan di bawah s. 3 dibaca bersama s. 34 dan/atau s. 3A dibaca bersama s. 34 tidak diterima di sisi undang-undang. Sabitan perayu, oleh itu, adalah terbatal dan terdapat kegagalan dalam pelaksanaan keadilan.

Case(s) referred to:

Abdul Ghani Ishak & Anor v. PP [1981] 1 LNS 96 FC ***(refd)***
C Mohammad v. PP [1973] 1 LNS 9 HC ***(refd)***
Charles Wilmot v. Rex 24 Cr App R 63 ***(refd)***
Cheong Sik Kwan v. PP [1959] 1 LNS 14 HC ***(refd)***
Chong Chee Pak v. PP [1948] 1 LNS 94 ***(refd)***
Hazraf Ali Hassan v. PP [2011] 1 LNS 829 HC ***(refd)***
Jagar Singh v. PP [1936] 1 LNS 25 HC ***(refd)***
Jemmison v. Priddle [1972] 1 All ER 539 ***(refd)***
Krishnan & Anor v. PP [1981] 1 LNS 206 FC ***(refd)***
Lee Chin Kee v. PP [1935] 1 LNS 29 HC ***(refd)***
Lee Swee Tee v. PP [1960] 1 LNS 58 HC ***(refd)***
Low Seng Wah v. PP [1961] 1 LNS 55 HC ***(refd)***

Periasamy & Anor v. PP [1993] 2 MLJ 551 ***(refd)***
PP v. Lee Pak [1937] 1 LNS 48 HC ***(refd)***
PP v. Mahfar Sairan [2000] 7 CLJ 600 HC ***(refd)***
PP v. Mohamad Sabu [2012] 5 CLJ 246 HC ***(refd)***
PP v. Mohamed Fathi Haji Ahmad [1979] 2 MLJ 75 ***(not foll)***
Quek Ching Kim v. Regina [1955] 1 LNS 104 HC ***(refd)***
Ravindran Ramasamy v. PP [2013] 8 CLJ 834 CA ***(refd)***
Rex v. Surrey Justices ex parte Witherick [1932] 1 KB 450 ***(refd)***
Saw Tuan Cheong v. PP [1946] 1 LNS 31 PC ***(refd)***
See Yew Poo v. PP [1948] 1 LNS 62 HC ***(not foll)***
Shawal Hj Mohd Yassin v. PP [2006] 6 CLJ 392 HC ***(refd)***
Tai Chai Keh v. PP [1948] 1 LNS 122 CA ***(refd)***
Tay Leong Siak v. PP [2002] MLJU 197 ***(refd)***
Teng Kum Seng v. PP [1960] 1 LNS 139 HC ***(refd)***
Teo Peng Chow & Ors v. PP [1957] 1 LNS 88 HC ***(refd)***
Yap Liow Swee v. PP [1937] 1 LNS 93 HC ***(refd)***
Yap Sing Hock & Anor v. PP [1992] 4 CLJ 1950; [1992] 1 CLJ (Rep) 356 SC ***(not foll)***

Legislation referred to:
Criminal Procedure Code, ss. 152, 153, 154, 156, 163, 164, 165, 166, 170, 422
Firearms (Increased Penalties) Act 1971, ss. 3A
Penal Code, s. 34

For the appellant - Mohd Shafee Abdullah; M/s Shafee & Co
For the respondent - Nahra Dollah; DPP

[Editor's note: For the Court of Appeal judgment, please see Ravindran Ramasamy v. PP [2013] 8 CLJ 834.]

Reported by Kumitha Abd Majid

JUDGMENT

Jeffrey Tan FCJ:

[1] The appellant was tried and convicted by the High Court for the following two offences:

> Bahawa kamu bersama-sama seorang lagi yang telah meninggal dunia, pada 14 Januari 2008, jam lebih kurang 11.00 pagi, di Kedai Emas Gayanthrii Tangga Maligai Jewellers , No 42 Lebuh Pasar, dalam Daerah Timur Laut, dalam Negeri Pulau Pinang, telah melepaskan tembakan yang boleh menyebabkan kematian semasa melakukan rompakan di mana kamu mengetahui rakan sejenayah tersebut ada di bawah jagaan atau kawalannya senjata api dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 3A Akta Senjatapi (Penalti Lebih Berat) 1971 yang boleh dihukum di bawah seksyen yang sama dan dibaca bersama seksyen 34 Kanun Keseksaan.

[2] Against conviction and sentence for the offence under s. 3A of the Firearms (Increased Penalties) Act 1971 ('FIPA'), the appellant appealed, but in vain, to the Court of Appeal (see *Ravindran Ramasamy v. PP* [2013]

A 8 CLJ 834; [2013] 4 MLJ 665). The appellant appealed to this court. On 22 September 2014, we unanimously allowed the appeal and set aside the said conviction and sentence. We now give our reasons.

[3] At 11am on 14 January 2008, the appellant and one Jayakumar a/l Muniady ('Jayakumar') entered the premises of "Kedai Emas Gayathrii B Tangge Mahligai Jewellers" of 42 Lebuh Pasar, District of Timur Laut, with the intention to commit robbery. Once inside the jewellers' premises, the appellant proceeded, with a hammer, to smash the glass display cases/ cabinets. At about the same time, Jayakumar discharged a shot from the gun in his hand. Both appellant and Jayakumar, who wore gloves, then grabbed C the jewellery from the broken display cases/cabinets. But they encountered resistance from the jeweller ('PW3') who threw chairs and other utensils at them. Jayakumar shot at PW3 but missed. Jayakumar and the appellant then bolted from the scene. But the appellant was apprehended not far from the jeweller's premises. Jewellery that belonged to PW3 was found on the D appellant. As for Jayakumar, he made good his escape, only to be later killed in a separate shoot-out with the police on 17 March 2009. Those were the primary facts that the prosecution adduced at the trial against the appellant, and upon which the appellant was convicted for an offence under s. 3A of FIPA.

E **[4]** In his written submission, learned counsel for the appellant categorically accepted those primary facts as established facts. But learned counsel orally submitted that the charge was bad for duplicity, and that the defective charge could not be cured by s. 422 of the Criminal Procedure Code ('the CPC'). The learned Deputy Prosecutor cited s. 156 of the CPC F and replied that the appellant who was able to put up his defence was therefore not misled, and that no prejudice had been occasioned.

[5] Section 163 of the CPC provides that "for every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately, except in the cases mentioned in ss. 164, G 165, 166 and 170". Duplicity is not allowed (*Jagar Singh v. PP* [1936] 1 LNS 25; [1936] 1 MLJ 92). "As regards duplicity, the leading English authority on the subject is the case of *Charles Wilmot v. Rex* 24 Cr App R 63 where the Lord Chief Justice quotes with approval the following passage from the judgment of Avory J in *Rex v. Surrey Justices ex parte Witherick* [1932] 1 KB H 450 at p. 452: 'It is an elementary principle that an information must not charge offences in the alternative, since the defendant cannot then know with precision with what he is charged, and of what he is convicted, and may be prevented on a future occasion from pleading '*autrefois* convict' (*Yap Liow Swee v. PP* [1937] 1 LNS 93; [1937] 1 MLJ 225). "A charge is only bad for I duplicity when it alleges facts constituting two different activities; it is

legitimate to charge in a single charge one activity even though that activity might involve more than one act" (*Jemmison v. Priddle* [1972] 1 All ER 539 per Lord Widgery CJ).

[6] Latent duplicity is committed when a single charge describes more than one offence. "Latent duplicity (also called 'latent ambiguity' or 'latent uncertainty') [is] where a single charge alleges the commission of only one offence, but the evidence led by the prosecution in relation to the charge discloses a number of separate offences, all of which could fit the allegation described in the charge" (Updates on legal developments by the Victorian Government Solicitor's Office dated 28 April 2014: '*Double or nothing' – The rule against duplicity in charging criminal offences*.) But to establish duplicity in a charge, it is not enough to show that the section or paragraph under which the accused is charged contemplated two offences; it is necessary to go further and show that both offences have been included in the same charge, thus embarrassing the accused in his defence and making it impossible for him to plead *autrefois* convict in respect of either of the alternatives (*Saw Tuan Cheong v. PP* [1946] 1 LNS 31; [1946] 1 MLJ 143). Ambiguity and latent duplicity in the charge must be such as to have caused a miscarriage of justice (*Tai Chai Keh v. PP* [1948] 1 LNS 122; [1948-1949] 1 MLJ 105).

[7] Apart from the rule against duplicity, the CPC also stipulates the form in which criminal charges are to be framed. Sections 152 to 154 of the CPC provide:

Section 152

(1) Every charge under this Code shall state the offence with which the accused is charged.

(2) If the law which creates the offence gives it any specific name the offence may be described in the charge by that name only.

(3) If the law which creates the offence does not give it any specific name so much of the definition of the offence must be stated as to give the accused notice of the matter with which he is charged.

(4) The law and section of the law against which the offence is said to have been committed shall be mentioned in the charge.

(5) The fact that the charge is made is equivalent to a statement that every legal condition required by law to constitute the offence charged was fulfilled in the particular case.

(6) If the accused has been previously convicted of any offence, and it is intended to prove that previous conviction for the purpose of increasing the punishment which the Court is competent to award, the fact, date and place of the previous conviction shall be stated in the charge. If the statement is omitted the Court may add it at any time before sentence is passed.

ILLUSTRATIONS

…

Section 153

(1) The charge shall contain such particulars as to the time and place of the alleged offence and the person, if any, against whom or the thing, if any, in respect of which it was committed as are reasonably sufficient to give the accused notice of the matter with which he is charged.

(2) When the accused is charged with criminal breach of trust or dishonest misappropriation of money it shall be sufficient to specify the gross sum in respect of which the offence is alleged to have been committed and the dates between which the offence is alleged to have been committed, without specifying particular items or exact dates, and the charge so framed shall be deemed to be a charge of one offence within the meaning of section 164:

Provided that the time included between the first and last of such dates shall not exceed one year.

(3) When the accused is charged with an offence relating to publication by electronic means, the place of publication is where the publication is seen, heard or read by any person.

Section 154

When the nature of the case is such that the particulars mentioned in sections 152 and 153 do not give the accused sufficient notice of the matter with which he is charged, the charge shall also contain such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose.

[8] Section 152 of the CPC provides that the charge shall "state the offence with which the accused is charged" and mention "the law and section of the law against which the offence is said to have been committed". Section 153 of the CPC provides that "the charge shall contain such particulars as to the time and place of the alleged offence … as are reasonably sufficient to give the accused notice of the matter with which he is charged". And when the nature of the case is such that the particulars mentioned in ss. 152 and 153 do not give the accused sufficient notice of the matter with which he is charged, s. 154 of the CPC provides that "the charge shall also contain such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose".

[9] The instant charge read that the appellant and another person who had since died, in the course of the commission of the scheduled offence of robbery at the stated place and time, discharged a firearm with intent to cause death or hurt and with knowledge that his accomplice had in his custody or control the firearm, and that the appellant had thereby committed an offence under s. 3A of the FIPA 1971 and punishable under the same said section read together with s. 34 of the Penal Code.

[10] Section 3 of the FIPA 1971 provides:

> Any person who at the time of his committing or attempting to commit or abetting the commission of a scheduled offence discharges a firearm with intent to cause death or hurt to any person, shall, notwithstanding that no hurt is caused thereby, be punished with death.

[11] Section 3A of the FIPA 1971 provides:

> Where, with intent to cause death or hurt to any person, a firearm is discharged by any person at the time of his committing or attempting to commit or abetting the commission of a scheduled offence, each of his accomplices in respect of the offence present at the scene of the commission or attempted commission or abetment thereof who may reasonably be presumed to have known that such person was carrying or had in his possession or under his custody or control the firearm shall, notwithstanding that no hurt is caused by the discharge thereof, be punished with death, unless he proves that he had taken all reasonable steps to prevent the discharge.

[12] "Under this section [3A] an accomplice who is liable for the offence is one who was not only present, but was also 'reasonably presumed to have known that the principal offender was carrying or had in his possession or under his custody or control a firearm" (*Krishnan & Anor v. PP* [1981] 1 LNS 206; [1981] 2 MLJ 121 at 122, per Salleh Abas FJ, as he then was, delivering the judgment of the court) but has not taken all reasonable steps to prevent the discharge of the firearm. Under the FIPA, the person who discharged the firearm is the principal offender who is liable under s. 3. An accomplice who was present and who may reasonably be presumed to have known that the person who discharged the firearm had in his possession or under his custody or control the firearm is liable under s. 3A, unless he proves that he had taken all reasonable steps to prevent the discharge of the firearm.

[13] That said, the charge against the appellant was for an offence under s. 3A. Going by that section of the law, the appellant was an accomplice and it should follow that the particulars of the offence would agree with the alleged fact that the appellant was an accomplice. But that was not how the instant charge was framed. The instant charge alleged that the appellant and Jayakumar discharged a firearm ("Bahawa kamu bersama-sama seorang lagi yang telah meninggal dunia, pada 14 Januari 2008, jam lebih kurang 11 pagi, di Kedai Emas Gayanthrii Tangga Maligai Jewellers, No 42 Lebuh Pasar, dalam Daerah Timur Laut, dalam Negeri Pulau Pinang, telah melepaskan tembakan yang boleh menyebabkan kematian semasa melakukan rompakan"), which was at odds with a charge under s. 3A. At the same time, the instant charge also alleged that the appellant was aware that Jayakumar had in his custody or control a firearm ("di mana kamu mengetahui rakan sejenayah tersebut ada di bawah jagaan atau kawalannya senjata api"), which was consistent with a charge under s. 3A. Section 153 of the CPC required that "the charge shall contain such particulars as to the time and place of the

A alleged offence … as are reasonably sufficient to give the (appellant) notice of the matter with which he is charged". But given that the particulars of the alleged offence straddled both ss. 3 and s. 3A, it would not seem that the instant charge could have given fair notice to the appellant of the section of the law against which the alleged offence was said to have been committed.
B "The real test in all these cases is whether the accused person gets sufficient certain notice of what is charged against him" (*Teng Kum Seng v. PP* [1960] 1 LNS 139; [1960] 1 MLJ 225 per Thomson CJ). The instant charge might have stated that s. 3A was offended. But as the particulars of the instant charge also pointed to another section [3] of the law being offended, it must
C be seriously doubted that the mere mention of s. 3A would have conveyed to the appellant that there was no other section of law against which the alleged offence was said to have been committed.

[14] To the contrary, the particulars in the instant charge could even have conveyed that the section of law against which the alleged offence was said
D to have been committed was s. 3. One essential ingredient of a s. 3A offence is the presence of the accomplice at the scene of the commission or attempted commission or abetment of the scheduled offence. But the presence of the appellant at the scene was not stated in the instant charge, which should not be so if the section of law against which the alleged offence was said to have
E been committed were s. 3A. On the other hand, the fact of the appellant being at the scene needed not be stated if the section of law against which the alleged offence was said to have been committed were s. 3. Suffice it to say that the instant charge was at sixes and sevens. While it stated that the section of the law against which the alleged offence was said to have been committed was s. 3A, it also pointed to s. 3.

F

[15] The mess in the instant charge was compounded by the fact that it stated that the section of law against which the alleged offence was said to have been committed was to be read together with s. 34 of the Penal Code, which s. 34 provides that "when a criminal act is done by several persons,
G in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone. Section 34, which was and is an evidential provision, was not an ingredient of the alleged offence. But with the induction of s. 34, the instant charge gave notice to the appellant that the case against him was that the criminal act done by him and Jayakumar was as if was done by him alone. In effect, the notice
H to the appellant was that the discharge of the firearm was as if it were discharged by him. The instant charge also alleged that the appellant was aware that Jayakumar had in his custody or control a firearm. Plainly, the instant charge described two offences or parts of two offences, one under s. 3 and the other under s. 3A, which ran foul of s. 163 of the CPC, and was
I therefore bad for duplicity.

[16] "One trend in judicial opinion that is discernible in the cases cited is that the courts are more ready to impugn a charge as bad for duplicity where it contains more than one offence in the alternative" (*Haji Abdul Ghani bin Ishak & Anor v. PP* [1981] 1 LNS 96; [1981] 2 MLJ 230 per Raja Azlan Shah CJ (Malaya), as HRH then was, delivering the judgment of the court). So it was held by Howes J in *Jagar Singh*, who pointedly disagreed with Sir Samuel Thomas CJ in *Lee Chin Kee v. PP* [1935] 1 LNS 29; [1935] FMSLR 33; [1935] MLJ 157 in which the learned Chief Justice held that a charge which offends s. 163 is not a mere irregularity but an illegality:

> In view of the express provisions of the Criminal Procedure Code section 163, that for every distinct offence there shall be a separate charge, I hold that the trial of the accused for the two distinct offences contemplated in section 46(i) of the Motor Vehicles Enactment (Cap. 168) in one charge was not a mere irregularity, but was an illegality, and for this reason the conviction must be quashed, and the fine repaid to the defendant.

[17] Thomson CJ, delivering the judgment of the court in *Cheong Sik Kwan v. PP* [1959] 1 LNS 14; [1959] 1 MLJ 189, agreed that the contravention of s. 163 of the CPC is an illegality that cannot be cured, and that any conviction cannot be sustained:

> As in the case of *Babulal v. Emperor* AIR 1938 PC 130; 65 IA 158; 174 IC 1 PC it is not necessary to discuss here the precise scope of what was decided in the case of *Subramania Ayyar v. King Emperor supra*, but that case clearly did decide that where charges are tried together in contravention of any of the provisions of the Criminal Procedure Code there is an illegality which cannot be cured and that any convictions had cannot be sustained.
>
> The provisions of the Code which are relevant here are contained in section 163, 164, 165 and 170 corresponding to sections 233, 234, 235 and 239 of the Indian Code.

[18] There is a line of authority which espoused the view that where each of the offences could have been the subject of a separate charge, and could have been proceeded with at one trial, the duplicity was an irregularity which could be cured by s. 422 of the CPC, provided that the accused was not prejudiced and there was no failure of justice occasioned by the irregularity.

[19] In *Yap Liow Swee v. PP* [1937] 1 LNS 93; [1937] MLJ 225 Terrell J stated as follows:

> The cases there dealt with are cases of separate offences contained in a single charge, where the prosecution set out to prove each of such offences, and each offence could have been the subject of a separate charge. This has been held in British India to be an irregularity which is curable, unless it can be shown that the accused has been prejudiced in that there has been a failure of justice, under a section which corresponds to section 422 of the Federated Malay States Criminal Procedure Code. But in a case like the present the prosecution do not set out to prove both

A recklessness and negligence, but merely one or the other. Accordingly the accused is embarrassed in his plea, and if he is convicted he is left in doubt as to the offence of which he has been convicted.

[20] Terrell J was quoted with approval in *See Yew Poo v. PP* [1948] 1 LNS 62; [1949] 1 MLJ 131, where Russell J, delivering the judgment of the court, B thus summed it:

> We are therefore of the opinion that, as in the present case each of the offences could have been the subject of a separate charge, and could have been proceeded with at one trial, the duplicity was merely an irregularity which can be cured under the provision of section 422 provided that the C accused was not prejudiced and there was no failure of justice occasioned by the irregularity.

[21] In *PP v. Mohamed Fathi bin Haji Ahmad* [1979] 2 MLJ 75, the issue was as to the correctness of the following charge:

> That you sometime between the 16th day of August, 1977 and 26th day D of September, 1977 at the Chase Manhattan Bank, Jalan Gereja, Wilayah Persekutuan, Kuala Lumpur, fraudulently used as genuine four documents, to wit, Waran Perjalanan Udara Awam Nos. 9036, 9089, 19032 and No. 19040, which you knew to be forged documents and that you thereby committed an offence under section 471 and punishable under section 465 of the Penal Code.

E

[22] Harun J, as he then was, held that the accused was not prejudiced and there had not been a failure of justice and that the charge, though bad for duplicity, was an irregularity which was cured by s. 422:

> Here the facts disclose that the offences were committed on three F separate occasions, two warrants having been presented to the bank at the same time on the third occasion. True the *modus operandi* was the same in respect of all the offences committed by the same person against the same bank but the evidence required to prove each charge need not necessarily be the same in all cases. The only exception to the rule of one offence one charge is contained in section 153(ii) in regard to the offence G of criminal breach of trust or dishonest misappropriation of property committed over a period of one year or less. This is the only instance when several offences may be telescoped into a single charge. Although the rule of one offence one charge is precise, it does not follow that there should be separate trials for each charge as there are provisions when several offences may be tried at one trial: see *Cheong Sik Kwan v. Public* H *Prosecutor* [1959] MLJ 189 where the Court of Appeal dealt fully with all these provisions. The charge as it stands is therefore bad for duplicity on two counts *viz*. it contravenes section 153 for not stating the time each offence was alleged to have been committed and it contravenes section 163 because it is alleged in a single charge the commission of four distinct offences …

I

> The question then is whether the failure to comply with section 163 is an illegality or an irregularity. In *See Yew Poo v. Public Prosecutor* [1949] MLJ 131, the Court of Appeal held that if 'each of the offences could have been the subject of a separate charge, and could have been proceeded with at one trial, the duplicity was merely an irregularity which can be cured under the provision of section 422 provided that the accused was not prejudiced and there was no failure of justice occasioned by the irregularity.' In the instant case … if the prosecution had proceeded with the three amended charges there would have been only one trial. I am satisfied that the accused was neither prejudiced nor has there been a failure of justice and I accordingly hold that the charge though bad for duplicity is an irregularity which is cured by section 422.

[23] But even if so, the instant charge could not have been the subject of separate charges that could have been proceeded with in one trial, as a charge under s. 3 would not permit a further charge under s. 3A, and *vice versa*. Under the FIPA 1971, an offender could not be both principal offender and accomplice at the same time. So even if separate charges could be preferred, the appellant could not be charged and tried under s. 3 and s. 3A. Hence, *Yap Leow Swee v. PP* and the authorities that followed it, could not apply to save the instant charge.

[24] But could ss. 156 or 422 of the CPC save the instant charge?

[25] Section 156 of the CPC provides:

> No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars shall be regarded, at any stage of the case, as material unless the accused was in fact misled by that error or omission.

[26] Section 422 of the CPC provides:

> Subject to the provisions contained in this Chapter no finding, sentence or order passed or made by a Court of competent jurisdiction shall be reversed or altered on account of:
>
> (a) any error, omission or irregularity in the complaint, sanction, consent, summons, warrant, charge, judgment or other proceedings before or during trial or in any inquiry or other proceeding under this Code;
>
> (b) the want of any sanction; or
>
> (c) the improper admission or rejection of any evidence,
>
> unless such error, omission, irregularity, want, or improper admission or rejection of evidence has occasioned a failure of justice.

[27] Pursuant to s. 156 of the CPC, "no error in stating the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars shall be regarded, at any stage of the case, as material unless the accused was in fact misled by that error or omission" (the

Indian equivalent, s. 215 of the Indian Criminal Procedure Code, ends with the words "and it has occasioned a failure of justice"). However, in view of s. 422, for an error or omission to be material, it is not enough that the accused has been misled; there must also be a failure of justice. "Whether any court should apply s. 422 aforesaid will depend, among other things, on whether the irregularity involves the breach of a principle of general importance to the administration of criminal justice. If it does, the court would not apply s. 422, as this appears to us to be the same thing as the irregularity having occasioned a failure of justice" (*Yap Sing Hock & Anor v. PP* [1992] 4 CLJ 1950; [1992] 1 CLJ (Rep) 356; [1992] 2 MLJ 714 at p. 364 (CLJ) and p. 725 (MLJ) per Peh Swee Chin SCJ, later FCJ, delivering the judgment of the court).

[28] It could also be noted that the 'error' alluded to in s. 156 of the CPC is the error in stating the offence or the particulars required to be stated in the charge, and not the error in stating the ingredients of an offence. That important distinction, whether an error in stating the particulars or an error in stating the ingredients, must be drawn for the purposes of ss. 156 and or 422 of the CPC. This is because where it was an error or omission in stating the ingredients of an offence, it had been consistently held by the courts that the accused would have been misled and that there must have been a failure of justice. *Low Seng Wah v. PP* [1961] 1 LNS 55; [1962] 1 MLJ 107, was the exceptional case, where Neal J held that the omission of an essential ingredient in the charge was not fatal, because of the unique provisions of s. 321 of the CPC (since repealed) which provided that "No judgment, sentence or order of Magistrate's court shall be reversed or set aside unless it is shown to the satisfaction of the court of a judge that such judgment, sentence or order was either wrong in law or against the weight of the evidence". *Low Seng Wah v. PP*, which was primarily decided under s. 321, is no precedent on s. 156 of the CPC.

[29] But in cases decided primarily under ss. 156 and or 422 of the CPC, courts had refused to invoke those provisions where it was an error or omission in stating the ingredients of an offence.

[30] In *PP v. Mahfar Sairan* [2000] 7 CLJ 600; [2000] 4 MLJ 791, Kang Hwee Gee J, as he then was, drew attention to the vast difference between the ingredients of an offence as opposed to the particulars of the act, and the need to distinguish between the ingredients of an offence and its mere particulars:

> Steven A Hirsch, in an article entitled '*Yap Sing Hock v. PP: Time for a Quick and Decent Burial'* [1993] 3 MLJ Lexis, draws a distinction between the elements (or what is more commonly described in courts as ingredients, and mere particulars and pointed out that a charge is bad only where the element specified therein had prejudiced the accused under the fair notice

rule. He wrote at p lxxvii of his article which he fortified by reference to numerous case decisions, which I have no reason to doubt as correctly representing the law: A

> The court failed to appreciate that every criminal charge contain two distinct types of averment: (i) a recitation of or reference to the elements (or 'ingredients') of the underlying statutory offence; and (ii) particulars which are not themselves elements of the underlying offence but which 'flesh out' the details of the allege crime. The first sort of averment, as the court correctly pointed out, is subject to the rule of strict construction in favour of liberty. B

[31] The other case where the court drew the distinction between particulars and ingredients was *Shawal Hj Mohd Yassin v. PP* [2006] 6 CLJ 392; [2006] 4 MLJ 334, where it was held by Azahar Mohamed JC, as he then was, that ss. 156 and 422 of the CPC only cure technical errors. Azahar Mohamed JC also enunciated on 'miscarriage of justice' and 'prejudice' in the context of ss. 156 and 422 of the CPC, which enunciation we approve and now reproduce below *in extenso*: C D

> In my view s. 156 has application only in a situation where there is an error either in stating the offence or the particulars required to be stated in the charge or there is an omission to state the offence or those particulars. In other words that section provides for a cure should there be any non-compliance with the technical provisions of the law. I do not think that provision can be invoked in the case at hand in a situation where the charge was defective as disclosing no offence under the section of the Act. I do not consider that this is an irregularity curable under s. 156. In the same way, the application of s. 422 is constrained to remedy no more than technical defects in the charge. To me where a trial in the court below is conducted on the basis of a charge which is defective as not disclosing an offence under the relevant section, it is an illegality which cannot be cured by s. 422. I should point out that the case of *Msimanga Lesaly v. PP* [2005] 4 MLJ 314 relied on by the learned deputy is distinguishable on its facts ... In stark contrast to that case, in the case before me it was not a minor defect; the charge was defective as disclosing no offence in law. E F G
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> The defect in the charge was a matter of substance and not merely of form. This was not a mere technical non-compliance of any provision of the law which can be condoned as an irregularity. I do not think it can be cured without causing injustice to the appellant. In my view, this was not a defect, disregarding it would not occasion a miscarriage of justice. To me the charge as framed did not disclose any offence and therefore I have no doubt that the defect of this kind was an illegality. I think the appellant was left in doubt as to the offence of which he had been convicted and sentenced. It is a fundamental principle of criminal law in our country that an accused person should know accurately of what offence he has been convicted and sentenced. In my judgment the error in the charge did cause prejudice and injustice to the appellant. In the end, I have no hesitation in saying that the charge framed against the appellant H I

A was bad in law. When looked in this way, one can see that there has been a substantial miscarriage of justice. As a consequence, the conviction in this case was a nullity.

[32] The following cases did not draw the distinction between particulars and ingredients. But they nonetheless exemplify that ss. 156 and/or 422 B would not be invoked to cure an error or omission in stating the ingredients of an offence.

[33] In *Chong Chee Pak v. PP* [1948] 1 LNS 94; [1948-1949] Supp MLJ 45, where the appellant was convicted on a charge of "assisting in the management of a public lottery", an offence not known in law, Callow J held C that the conviction was a nullity (see also *Quek Ching Kim v. Regina* [1955] 1 LNS 104; [1956] 1 MLJ 54, *Lee Swee Tee v. PP* [1960] 1 LNS 58; [1960] 1 MLJ 161, where the respective charge under the Common Gaming Houses Ordinance was similarly wrongly worded, and where the conviction was either quashed and or set aside).

D **[34]** In *Teo Peng Chow & Ors v. PP* [1957] 1 LNS 88; [1957] 1 MLJ 118, Buhagiar J said that where there was an error in the ingredients of the charge, it could not be said that the accused was not misled:

> The next point to consider is whether this error in the charge is material E or not and whether the provisions of section 156 of the Criminal Procedure Code applies. Under that section an error in a charge is not material unless the accused was in fact misled by such error or omission. It seems from the grounds of judgment of the learned Magistrate that he did not consider the words in the charge referred to above were an essential ingredient in an offence under section 10 but he did not amend F the charge at the close of the case for the prosecution and at that stage counsel for the defendant submitted that there was no case to answer on the ground that there was "no evidence to show that the accused managed or assisted in the management of the club and no evidence that all three accused arranged a meeting on behalf of the club." Under the circumstances I do not think it can be said that the appellants were not G misled by the error in the charge. I, therefore, set aside the conviction and sentence and order re-trial before another Magistrate.

[35] And in *C Mohammad v. PP* [1973] 1 LNS 9; [1974] 1 MLJ 25, Syed Agil Barakbah J, as he then was, held that as the charge disclosed no offence known to law, it was not "necessary nor desirable for me to consider the H provisions of the Criminal Procedure Code as urged by the learned Deputy Public Prosecutor because there [was] an apparent miscarriage of justice."

[36] Other like cases, where the charge disclosed no known offence and where the conviction was quashed and or set aside, were (i) *Periasamy & Anor v. PP* [1993] 3 CLJ 46; [1993] 2 MLJ 551; (ii) *Tay Leong Siak v. PP* [2002] I MLJU 197, where the charge did not follow the wording of the law that created the offence, and where Low Hop Bing J, as he then was, said that the charge was so defective as to render it an illegality such that it was

impossible to invoke ss. 156 and 422 of the CPC; (iii) *Hazraf Ali bin Hassan v. PP* [2011] 1 LNS 829; [2012] 7 MLJ 355, where Akhtar Tahir J held that s. 156 does not apply where the defect in the charge does not disclose any known offence, and that the accused was "prejudiced by being ignorant of the actual nature of the offence committed by him. As such he would be unable to properly defend himself"; and (iv) *PP v. Mohamad Sabu* [2012] 5 CLJ 246; [2012] 7 MLJ 547, where Zamani A Rahim J held that the omission of ingredient is a fundamental defect that could not be cured by s. 422. Evidently, recent authority would not agree with *PP v. Lee Pak* [1937] 1 LNS 48; [1937] 1 MLJ 265, where the essential ingredients of the offence were missing, but it was held by Whitley Ag CJ that the errors were covered by s. 156 as it was not alleged that the accused was misled.

[37] Sections 156 and or 422 of the CPC would not save a defective charge where the accused was misled and a failure of justice had occasioned. In the instant case, that the appellant would have been misled and that a failure of justice would have been occasioned was most apparent. The duplicity of charges would certainly have misled the appellant. The omission in not stating the presence of the appellant at the scene would have misled him to believe that the case to answer was not for an offence under s. 3A. Rather, the omission in not stating the presence of the appellant at the scene coupled with the error in stating that the appellant and Jayakumar discharged a firearm, could even have convinced the appellant that the case to answer was indeed for an offence under s. 3. The charge for an offence – s. 3 read with s. 34 and or s. 3A read with s. 34 – is unknown in law. The conviction was a nullity. Clearly, there was a total failure in the administration of justice, which could only be put right by an order in favour of liberty of the subject.

[38] It was for the aforesaid reasons that we allowed the appeal and set aside the conviction and sentence.